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Ganda Setia Cemerlang Sdn Bhd & Anor v Maika Holdings Bhd (in liquidation)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1320–07 OF 2016
DAVID WONG, HAMID SULTAN AND MARY LIM JJCA
16 OCTOBER 2017

C

Companies and Corporations — Winding up — Leave — Whether winding up court could grant specific relief order — Whether appellants established prima facie case — Companies Act 1965 s 263(2)

D

The appellants sought leave under s 263(2) of the Companies Act 1965 ('the Act') to commence proceedings against the respondent as the respondent was voluntarily wound up. Prior to the respondent being wound up, they had entered into an agreement to sell two plots of land to the first appellant. In respect of the first plot of land ('the bigger plot'), the respondent together with various individual owners were the registered proprietors of the undivided portion of land. The respondent had sold its share of the land to the appellants. The respondent was the sole registered proprietor of the second plot ('the smaller plot'). There were several terms and conditions of the sale and purchase agreement which was agreed to by the respondent, namely: (a) that the respondent was to submit an application to subdivide the bigger plot and ultimately see to the issuance of individual titles with the names of the appellants endorsed therein; and (b) evict or remove all and any squatters or unlawful occupiers from the land sold. The two plots were registered in the names of the appellants after full payment was affected. However, the two conditions of the sale and purchase agreement were not resolved. The appellants decided to take action against the respondent for breach of contract seeking an order of specific performance. Since the respondent was wound up, the appellants were required to obtain leave of the winding up court before commencing its claim. This application was opposed by the liquidators of the respondent and leave was refused. The application for leave was dismissed by the trial judge, hence, the present appeal.

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Held, allowing the appeal with costs of RM5,000 subject to allocator; setting aside decision of the High Court and granting leave to the appellants to commence action against the respondent:

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(1) Upon examination of the rationale and basis for requiring leave, the test remained the same regardless of how the liquidation of the company was set afoot. No distinction needed to be drawn between the two situations

envisaged under ss 226(3) and 263(2) of the Act since no meaningful purpose would be served (see para 22).

(2) Contrary to the view of the learned judge, the remedy of specific performance remained one which the winding up court could not make. It could not be a remedy that could be resolved through the lodgment of a proof of debt with the liquidators of the respondent. The order of specific performance was a discretionary remedy and the law on pleadings allowed for this alternative remedy in the event this specific performance was not granted. This was due to the fact that damages were not an adequate remedy that specific performance was sought. In the event the court did not agree with the appellants, then the appellants want to be allowed this avenue. There was no reason for leave to commence action against the respondent to be denied due to this alternative plea (see para 41).

(3) It was undoubted that the appellants had shown that their dispute was real, genuine and serious and that they had a prima facie case. The appellants had amply satisfied those conditions. The allegations of breach of agreement by the respondent were not baseless or without substance. They were not frivolous and were not an attempt to waste the respondent's funds or even to score an advantage over the creditors of the respondent (see para 47).

(4) The winding up court should not decide whether an order of specific performance ought to be granted on the facts. That was the function and role of the civil court in the event leave to commence litigation was allowed. The winding up court should not be second guessing what that court, may or may not eventually decide on the merits. That was entirely within the purview of the civil court (see para 48).

[Bahasa Malaysia summary

Perayu-perayu telah memohon kebenaran di bawah s 263(2) Akta Syarikat 2016 ('Akta tersebut') untuk memulakan prosiding terhadap responden kerana responden telah digulungkan secara sukarela. Sebelum responden digulungkan, mereka telah memasuki perjanjian untuk menjual dua plot tanah kepada perayu pertama. Berhubung plot pertama tanah itu ('plot lebih besar'), responden bersama pelbagai pemilik individu adalah pemilik berdaftar bahagian tanah yang tidak dibahagikan. Responden telah menjual bahagian tanahnya kepada perayu-perayu. Responden adalah pemilik berdaftar plot kedua ('plot lebih kecil'). Terdapat beberapa terma dan syarat perjanjian jual beli yang telah dipersetujui oleh responden, iaitu: (a) bahawa responden perlu mengemukakan permohonan untuk membahagikan plot lebih besar dan akhirnya melihat keluaran hakmilik berasingan dengan nama-nama perayu yang diindorskan; dan (b) mengusir atau mengeluarkan semua dan mana-mana setinggan atau penghuni yang menyalahi undang-undang dari

A tanah-tanah yang dijual. Dua plot tersebut berdaftar atas nama-nama perayu selepas bayaran penuh terjejas. Walau bagaimanapun, dua syarat perjanjian jual beli tidak diselesaikan. Perayu-perayu memutuskan untuk mengambil tindakan terhadap responden kerana melanggar kontrak memohon perintah pelaksanaan spesifik. Oleh kerana responden telah digulungkan, B perayu-perayu mengkehendaki untuk memperoleh kebenaran penggulungan mahkamah sebelum memulakan tuntutannya. Permohonan ini telah ditentang oleh penyelesai-penyelesai responden dan kebenaran telah ditolak. Permohonan untuk kebenaran telah ditolak oleh hakim perbicaraan, justeru, rayuan ini.

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Diputuskan, membenarkan rayuan dengan kos RM5,000 tertakluk kepada alokatur; mengetepikan keputusan Mahkamah Tinggi dan memberikan kebenaran kepada perayu-perayu untuk memulakan tindakan terhadap responden:

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(1) Setelah pemeriksaan berhubung rasional dan asas untuk menghendaki kebenaran, ujian masih sama meskipun tentang bagaimana pembubaran syarikat telah ditetapkan. Tiada perbezaan diperlukan antara dua keadaan yang termaktub di bawah ss 26(3) dan 263(2) Akta tersebut oleh E kerana tiada tujuan yang bermakna akan disampaikan (lihat perenggan 22).

(2) Bertentangan dengan pendapat hakim yang bijaksana, remedi untuk pelaksanaan spesifik masih suatu yang mahkamah penggulungan tidak boleh buat. Ia bukan suatu remedi yang boleh diselesaikan melalui F kemasukan bukti keberhutangan dengan penyelesai-penyelesai responden. Perintah untuk pelaksanaan spesifik adalah remedi berdasarkan budi bicara dan undang-undang berhubugn pliding membenarkan remedi alternatif ini sekiranya pelaksanaan spesifik ini tidak diberikan. Ini adalah berdasarkan fakta bahawa ganti rugi bukan G remedi yang mencukupi di mana pelaksanaan spesifik diberikan. Sekiranya mahkamah tidak bersetuju dengan perayu-perayu, maka perayu-perayu ingin dibenarkan dalam skop ini. Tiada sebab untuk kebenaran bagi memulakan tindakan terhadap responden dinafikan kerana pli alternatif ini (lihat perenggan 41).

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(3) Ia tidak diragui bahawa perayu-perayu telah menunjukkan bahawa pertikaian mereka adalah nyata, tulen dan serius dan bahawa mereka mempunyai kes prima facie. Perayu-perayu telah cukup memenuhi syarat-syarat tersebut. Dakwaan pelanggaran perjanjian oleh responden I tiada asas atau tanpa substans. Mereka tidak remeh dan tidak cuba membazir wang responden ataupun mendapt kelebihan daripada pemiutang-pemiutang responden (lihat perenggan 47).

(4) Mahkamah penggulungan tidak patut memutuskan sama ada suatu perintah untuk pelaksanaan spesifik patut diberikan berdasarkan fakta

tersebut. Ini adalah fungsi mahkamah sivil sekiranya kebenaran untuk memulakan litigasi telah dibenarkan. Mahkamah penggulungan tidak patut mengandaikan apa yang mahamah tersebut, boleh atau tidak boleh akhirnya mutuskan atas merit. Ia adalah sepenuhnya dalam bidang kuasa mahkamah sivil (lihat perenggan 48).]

Notes

For cases on winding up in general, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1261–2044.

Cases referred to

Bruno Phillipe Fehrenbach v Pegawai Penerima, Malaysia (selaku Pelikuidasi Han Pacific Sdn Bhd) [1999] 5 MLJ 321; [1999] 6 CLJ 177, HC (refd)
Capita Financial Group Ltd v Rothwells Ltd (No 2) [1989] 7 ACLC 634 (refd)
Coastal Constructions Pty Ltd (In Liquidation), Re [1994] 13 ACSR 329 (refd)
Gordon Grant & Grant Pty Ltd, Re [1983] 2 Qd R 314 (refd)
Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd [2014] 4 MLJ 886; [2014] 7 CLJ 202, CA (folld)
Mosbert Berhad (in liquidation) v Stella D'Cruz [1985] 2 MLJ 446, SC (refd)
Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd [2008] 5 MLJ 191, CA (refd)
Speiser v Locums Financial Management Pty Ltd [1997] 22 ACSR 478 (refd)
St Cuthbert's Lead Smelting Co, Re [1866] WN 84, SC (refd)
Stuart Bros Pty Ltd, Re [1995] 16 ACSR 451 (refd)
Thomson v Mulgoa Irrigation Co Ltd [1893] 4 BC 33 (refd)
Vagrand Pty Ltd (In Liq) v Fielding [1993] 41 FCR 550; 113 ALR 128, FC (refd)
Walker, Ex p [1982] 6 ACLR 423 (refd)
Westech Sdn Bhd (in voluntary liquidation) v Thong Weng Lock (as surviving partner of Thong Kee Trading Co) [2014] 3 MLJ 427, CA (refd)

Legislation referred to

Companies Act 1961 [AU] s 371(2)
Companies Act 1965 ss 211, 226(3), 254, 255, 255(6), 263(2), Part X
Companies Act 1989 [AU] s 471B
Rules of Court 2012 O 18 r 19

Appeal from: Originating Summons No WA-24NCC-69–02 of 2016 (High Court, Kuala Lumpur)

Sugandra Rao a/l Naidu (Rao & Co) for the appellants.
Anantha Krishnan a/l Gopala Krishnan (Orpheus M Modili with him) (Anantha Krishnan) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] The appellants sought leave under s 263(2) of the Companies Act 1965 to commence proceedings against the respondent as the respondent was voluntarily wound up under s 254 of the Companies Act 1965 on 20 May 2015. The application was opposed by the liquidators of the respondent. Leave was refused.

[2] At the appeal, we unanimously allowed the appeal and set aside the decision of the High Court. Our reasons in full are set out below.

BRIEF FACTS

[3] Prior to being wound up, the respondent entered into an agreement dated 21 March 2011 wherein subject to various terms and conditions, the respondent agreed to sell to the first appellant two plots of land for a total purchase consideration of RM3.312m. In respect of the first piece, the respondent together with various individual owners were the registered proprietors of an undivided portion of land held under Geran 94160, Lot 5732, Mukim Batu, Daerah Kuala Langat, Negeri Selangor. Effectively, the respondent sold its shares representing 22.4163 acres to the appellants. This was known as the 'bigger plot' and it was sold for RM218,550.60. The other plot, known as the 'smaller plot' comprised 1.5837 acres of land held under Geran 50209, Lot 1870, Mukim Batu, Daerah Langat, Negeri Selangor. The respondent was the sole registered proprietor of this plot which it sold to the first appellant for RM3,093,449.40.

[4] Under the terms and conditions of the sale and purchase agreement, the respondent agreed to:

(a) submit an application to sub divide the bigger plot and ultimately see to the issuance of individual titles with the names of the appellants endorsed therein; and

(b) evict or remove all and any squatters or unlawful occupiers from the land sold.

[5] There was also a temple sited on the bigger plot which the appellants alleged that the respondent agreed to relocate. These conditions were not fulfilled. The bigger plot remained un sub divided and some squatters remain on the affected plot. The appellants take the position that since a portion of the purchase monies paid were retained by solicitors then engaged by the respondent, the respondent had acknowledged its obligation to attend to the removal of squatters and the relocation of the temple.

[6] On 9 November 2012, the two plots were registered in the names of the appellants after full payment was affected. The bigger plot was registered in the name of the two appellants while the smaller plot was registered in the first appellant's name. The respondent remained the registered proprietor of 94837/470100 share of the bigger plot. Despite repeated requests from the appellants, the two conditions mentioned above and the matter of the temple remained unresolved. The appellants decided to sue the respondent for breach of contract seeking primarily an order of specific performance of these two obligations under the sale and purchase agreement. Because the respondent was wound up, though voluntarily, the appellants were required to obtain leave of the winding up court before commencing its claim. The three liquidators of the respondent opposed the application for leave. Two of the three liquidators are former directors of the respondent.

[7] On the matter of the squatters, the respondent denied owing any obligation as alleged and further contended that in any event, all squatters had already been removed. As for the relocation of the temple, the respondent also denied owing any obligation since this only arose after the appellants had taken possession of the land. According to the respondent, it had since sold a further 7 acres of the bigger plot to a company known as 'TS Land Management Sdn Bhd'. The balance share of the bigger plot was said to be held by the respondent on trust for a Tamil school located on the plot. Given that the respondent was therefore no longer the registered proprietor of the two plots of land, the respondent argued that it was in no position to take any action against the squatters, or even to subdivide the bigger plot. Any effort in these respects will not only be futile or 'doomed to fail' but will also result in unnecessary litigation and costs. The respondent also contended that the appellants' interest was really monetary in value as the appellants could initiate action themselves in the two respects, and then recover any related expenses from the respondent by filing a proof of debt with the liquidators.

DECISION OF THE HIGH COURT

[8] The learned judge refused to exercise discretion under s 263(2) of the Companies Act 1965 in the appellants' favour and the application for leave was dismissed for the following reasons.

[9] First, having established that leave under s 263(2) was required even where the winding up was voluntary, the learned judge found that the appellants had nevertheless failed to establish a prima facie case which is required when securing leave of the court. The learned judge agreed with the respondent that the appellants' claim was misconceived because the appellants were the newly registered proprietors of the two plots. With that registration, the respondent was divested of all interest in the two plots and was not in the

position to attend to the complaints of the appellants. The learned judge added that the appellants were aware of this position as reflected in the alternative relief sought by the appellants, that the appellants be given leave to evict the squatters themselves. The learned judge further agreed with the respondent that it was for the appellants to apply for the subdivision of land and to evict the unlawful occupants or squatters, and then recover the related expenses from the liquidators through the filing of a proof of debt.

[10] It was also the view of the learned judge that leave ought not to be given because the order of specific performance sought would render financial hardship on the respondent. This was said to be contrary to the purpose of winding up, which is that the assets of the company are to be preserved for fair distribution and not exhausted unnecessarily.

DECISION OF THE COURT OF APPEAL

[11] This appeal calls for the consideration of s 263(2) of the Companies Act 1965. Section 263(2) requires leave of court to be obtained before any action or proceeding may be commenced or proceeded with where the company has been wound up, though voluntarily. In this case, the respondent was wound up voluntarily by its members on 20 May 2015. Three of its members, namely T Tamil Selvan a/l Tangavellu, Ramesh a/l Alagu and Arasu a/l M Thangaveloo were appointed as its liquidators. On behalf of the respondent, T Tamil Selvan together with Arasu a/l M Thangaveloo signed the SPA dated 21 March 2011 that is the subject of the intended action. T Tamil Selvan a/l Tangavellu has since passed away.

[12] We observe from the authorities cited by both parties that some of those cases in fact concerned not s 263(2) but, s 226(3) of the Companies Act 1965. Having examined the provisions and the case law, we feel compelled to make some observations on the two provisions. These provisions read as follows:

226 Copy of order to be lodged, etc.

(1) Within seven days after the making of a winding up order the petitioner shall lodge with the registrar notice of —

(a) the order and its date; and

(b) the name and address of the liquidator.

(2) On the passing ...

Actions stayed on winding up order

(3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except —

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

263 Property and proceedings.

(1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditor's voluntary winding up shall be void.

(2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

[13] Both sections are part of Part X of the Companies Act 1965. Part X deals with matters relating to the winding up of a company. Part X contains 5 Divisions:

Division 1 – Preliminary matters

Division 2 – Winding up by the Court

Division 3 – Voluntary winding up

Division 4 – Provisions applicable to every mode of winding up

Division 5 – Winding up of unregistered companies

[14] In law, a company may be wound up either by the court or voluntary by the company itself — see s 211 of Division 1. Once a company has been wound up by the court, or once the winding up court has appointed a provisional liquidator, s 226(3) mandates that leave of the winding up court must be procured either before an action or proceeding is commenced or if already commenced, proceeded with.

[15] Where the company is wound up voluntarily, and that may be by special resolution of the company, or due to the expiration of the duration of the company fixed either in its memorandum or articles of association and a general resolution has been passed to that effect (see s 254) or even on grounds of insolvency and a statutory declaration to that effect has been lodged with the registrar of companies and with the official receiver (see s 255), s 263(2) carries a similar requirement on leave as that found in s 226(3).

[16] In both situations, the court may impose terms when granting leave. The difference, however, between the two scenarios is when leave must be procured. In the case of a company which has been wound up by the court, it will be upon pronouncement of the order to wind up the company or a provisional liquidator has been appointed. In the case of a company which has been wound up voluntarily, leave must be sought either at the time of the passing of the resolution to wind up the company, or in the case where a provisional liquidator has been appointed, upon lodgment of the statutory declaration with the registrar of companies and with the official receiver — see

A s 255(6).

[17] Moving on and given that this requirement for leave exists under both scenarios, the issue then is whether the exercise of discretion in the granting of leave is subject to or upon the same considerations. In this respect, the decisions B of the Court of Appeal in *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd* [2008] 5 MLJ 191 and *Westech Sdn Bhd (in voluntary liquidation) v Thong Weng Lock (as surviving partner of Thong Kee Trading Co)* [2014] 3 MLJ 427 are instructive. In both decisions, the company in question had been wound up voluntarily.

C

[18] In both appeals, the Court of Appeal applied the test or approach that was laid down in *Mosbert Berhad (in liquidation) v Stella D'Cruz* [1985] 2 MLJ 446. That test being whether the claim intended to be filed or proceeded with can be dealt with adequately in the winding up or the remedy sought cannot be D given in the winding up proceedings. If all reliefs sought may be obtained in the winding up court, then leave will be refused. Quoting an old English decision of *Re St Cuthbert's Lead Smelting Co* [1866] WN 84, speaking for the Supreme Court, Seah SCJ said:

E > In *Re Cuthbert Lead Smelting Co Ltd* it was held that if the applicant could obtain all the relief in the winding up leave would be refused. *In short, the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given him in the winding up proceedings*. (Emphasis added.)

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[19] As mentioned earlier, this test was applied in *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd*. According to the Court of Appeal, at p 134, leave to proceed would be granted where a claim cannot be adequately dealt with in the winding up by the company's liquidators:

G > [11] On the guiding principle for the court to grant leave with a view to commencing action against a company that has been wound-up we could like to refer to the case of *Mosbert Berhad (in liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 wherein Seah SCJ, in delivering the judgment of the Supreme Court at p 447 had this to say:
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> H > > In *Re Cuthbert Lead Smelting Co Ltd* it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the court will always give an applicant leave if his claim cannot be adequately in the winding up or if the remedy he seeks cannot be given to him in the winding up proceedings.
>
> [12] it is clear based on the above cited case authority leave to proceed would only I be granted when the plaintiff's claim cannot be adequately dealt with in winding up of the defendant's company or when the plaintiff is seeking a remedy which cannot be given in the winding up of the defendant's company.

[20] Similarly, in *Westech Sdn Bhd (in voluntary liquidation) v Thong Weng*

Lock (as surviving partner of Thong Kee Trading Co), the Court of Appeal opined that the 'real test' for an application of s 263(2) is not whether the company is wound up voluntarily by its members or otherwise; but the test as laid down in *Mosbert Berhad (in liquidation) v Stella D'Cruz*. The same view expressed by the Seah SCJ in *Mosbert Berhad* was once again quoted by the Court of Appeal:

> [35] On this point we disagree with the view expressed by learned counsel for the plaintiff that s 263 of the Companies Act 1965 does not apply to voluntary winding up. Case laws have established that the test for an application of s 263 of the Companies Act 1965 is not whether the winding up is voluntary by members or otherwise. The real test is laid down by the then Supreme Court in *Mosbert Bhd* which is stated in this form:
>
> > In *Re Cuthbert Lead Smelting Co Ltd* it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an applicant leave if his claim cannot be adequately in the winding up or if the remedy he seeks cannot be given him in the winding up proceedings.

[21] Now, what needs to be pointed out is that in *Mosbert Berhad (in liquidation) v Stella D'Cruz*, the application for leave was one made under s 226(3) and not s 263(2) of the Companies Act 1965. This was because Mosbert had been wound-up by an order of court and not upon voluntary liquidation. Consequently, the application for leave to commence action was properly initiated under s 226(3).

[22] We are however, of the considered opinion that having examined the rationale and the basis for requiring such leave, the test remains the same regardless of how the liquidation of the company was set afoot. Save for the timing when such an application is to be made, no distinction needs to be drawn between the two situations envisaged under ss 226(3) and 263(2), particularly since no useful or meaningful purpose will be served.

[23] The rationale for this requirement for leave was carefully explained by the Supreme Court in *Mosbert Berhad*. In explaining why applications for leave must be made inter partes, the Supreme Court said:

> ... it cannot be disputed that the primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company. It is for this reason that application under s 226(3) of the Companies Act 1965 should be made inter partes so that the summons could be served on the official receiver who should be heard before the discretion of the court is exercised. Without hearing

A the official receiver, the court cannot be said to have exercised the discretion judicially.

B **[24]** This underlying rationale not only explains why all parties concerned must be heard at the time of the application, it also indicates why those persons must be heard. It reminds that the primary object of winding up of a company is to collect and distribute 'the assets of the company pari passu amongst unsecured creditors after payment of preferential debts'. The leave mechanism ensures 'that all claims against the company in liquidation which can be determined by cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company'. Although this has been explained as the availability of remedy test, that if the relief sought can be obtained in the liquidation proceedings through the filing of a proof of debt, leave must be refused, the reasoning for this test must not be overlooked. At the end of the day, it is what is available for distribution pari passu amongst the unsecured creditors of the company that is paramount. The concerns on costs of expensive litigation including multiple suits litigation are obviously legitimate and not misplaced.

E **[25]** Both parties have cited to us the more recent decision of *Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd* [2014] 4 MLJ 886; [2014] 7 CLJ 202. The appeal in *Mesuntung Property* arose from a refusal to grant leave under s 226(3) and not under s 263(2), which is our present focus of attention. Kimlin Housing Deveopment Sdn Bhd, the respondent, was wound up by the court on 27 February 1989.

G **[26]** In allowing the appeal against the decision of the High Court which had rejected the application for leave, the Court of Appeal examined what was the 'threshold test envisaged in s 226(3) of the Companies Act 1965 before leave is granted'. The Court of Appeal considered the approach by the local courts thus far and compared it with that adopted in Australia before drawing the conclusion that an applicant for leave under s 226(3) must satisfy a 'two criteria' test. We shall return to this test shortly.

H **[27]** As far as the local cases are concerned, the Court of Appeal considered first, the approach adopted by the High Court in *Bruno Phillipe Fehrenbach v Pegawai Penerima, Malaysia (selaku Pelikuidasi Han Pacific Sdn Bhd)* [1999] 5 MLJ 321; [1999] 6 CLJ 177 where Abdul Malik Ishak J held that leave under I s 226(3) would 'readily be given by the Court if all requirements are fulfilled'. His Lordship then examined how judicial discretion under s 371(2) of the Australian Companies Act 1961 is exercised by the courts in Australia. Section 371(2) is in pari materia with s 226(3) but it was amended and replaced by s 471B of the Australian Companies Act 1989. Section 471B is slightly

different in wording from our s 226(3). Citing *Re Gordon Grant & Grant Pty Ltd* [1983] 2 Qd R 314; *Re Stuart Bros Pty Ltd* [1995] 16 ACSR 451; and *Speiser v Locums Financial Management Pty Ltd* [1997] 22 ACSR 478 in support, Abdul Malik Ishak J said that the court considers whether leave to proceed should be granted by 'looking at the nature of the plaintiff's claim, the balance of convenience and the justice of the case'. Again citing *Re Gordon Grant & Grant Pty Ltd* and *Ex p Walker* [1982] 6 ACLR 423, His Lordship opined that leave will be granted 'as a matter of course' where it is unlikely that the plaintiff will obtain any advantage over the creditors and that no prejudice will be caused either to the creditors or to the orderly winding up of the company. His Lordship further agreed with the view expressed in *Re Coastal Constructions Pty Ltd (In Liquidation)* [1994] 13 ACSR 329, that in determining whether leave to proceed should be granted:

> ... there was a necessity to examine the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved and lastly, the stage which the proceedings have reached. It must not be forgotten that the applicant too must establish that he or she has a prima facie case meaning that the applicant must show that there is a real dispute between the parties (*Zempilas v JN Taylor Holdings Ltd (In Prov Liq)* [1991] 3 ACRS 755 (SC SA); *Vagrand Pty Ltd (In Liq) v Fielding* [1993] 41 FCR 550; [113 ALR 128]).

[28] We have no issue with the test propounded and followed in the Australian jurisdiction, but, we must point out that the discussion of the High Court on this test is obiter since the primary question before the court was whether s 226(3) applied in the case of a derivative action. The applicant plaintiff was a minority shareholder in the defendant company that was wound up. The plaintiff contended that a derivative action is an action for the benefit of, and not an action against, the company. The applicant plaintiff was seeking a declaration to that effect. The High Court agreed with the plaintiff. In the course of deliberations, the High Court saw it fit to consider the Australian approach on s 226(3) before concluding that the plaintiff was not required to apply for leave under s 226(3) since a derivative action is not an action against the wound up company. The declaratory order was accordingly, given. The approach of the Australian Courts or for that matter, our courts, though enlightening, is irrelevant to the central issue of application of s 226(3) to a derivative action.

[29] Returning to *Mesuntung Properties* and the proper test or approach in a case where the primary issue is whether leave ought to be allowed under s 226(3), the Court of Appeal went on to consider the decision of *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd,* discussed earlier, noting that the Court of Appeal in that case had followed the approach laid down by the Supreme Court in *Mosbert Berhad* — see para 21 at p 210.

[30] The Court of Appeal however, did not stop there and simply apply the test in *Mosbert Berhad*. Like Abdul Malik Ishak J in *Bruno Phillipe*, the Court of Appeal similarly turned to examine the approach in Australia on the threshold question of leave. This time, the Court of Appeal considered two decisions, one of which was cited in *Bruno Phillipe*, that is *Vagrand Pty Ltd (In Liq) v Fielding* [1993] 41 FCR 550; 113 ALR 128; and *Capita Financial Group Ltd v Rothwells Ltd (No 2)* [1989] 7 ACLC 634.

[31] In *Vagrand Pty Ltd*, the Federal Court of Australia also discussed the rationale for imposing a requirement for leave, that as explained by Manning J in *Thomson v Mulgoa Irrigation Co Ltd* [1893] 4 BC 33, it was to safeguard a company in liquidation from being harassed and its assets wasted by unnecessary litigation. In order to do that, the Federal Court is obliged to investigate the intended litigation. The Federal Court accepted that this did not mean that all the elements of an intended claim must be proved. That would be burdensome and shut out many meritorious claims. The Federal Court recognised that it is commonplace for actions against companies to depend upon documentary evidence and such evidence may be not be available until discovery has taken place or witnesses interrogated or subpoenaed.

[32] In *Capita Financial Group Ltd*, the court also adopted the same approach, going further to state that provisional liquidators and liquidators are 'entitled to be protected from involvement in court proceedings which may be perhaps only of a nuisance nature, or which may be thought to be totally devoid of any substance. The resources of the company in liquidation should not be frittered away in defending baseless claims'. The consistent and uniform approach of the court 'over the years is to demand that there be evidence showing a prima facie case'.

[33] Having examined these authorities, both local and from Australia, the Court of Appeal then concluded:

> [24] From the above authorities, the appellant has the burden of satisfying the Court of two criteria:
>
> (a) the appellant's claim cannot be adequately dealt with by the winding up Court;
>
> (b) the appellant has a prima facie case against the respondent.

[34] The Court of Appeal first found the appellant's claim for the remedy of specific performance and not for monetary returns could not be dealt with by the winding up court. On the issue of what amounts to a prima facie case in the context of s 226(3), the court said that the court has to be satisfied that 'there is a serious dispute between litigants which warrant a trial to determine the truth of the combating allegations'. The Court of Appeal likened the approach

to that applied when 'dealing with an application to strike out under O 18 r 19 of the Rules of Court 2012 despite the consideration that the liquidator ought not to be burdened with wasteful financial resources in defending frivolous legal actions'. According to the Court of Appeal, 'that consideration in our view is also a consideration for other suits not involving wound up companies as all defendants should also not be burdened with financial resources to defend frivolous legal actions'.

[35] The Court of Appeal in *Mesuntung Property* then set about examining the putative claim. The Court of Appeal found that the appellant, itself a wound up company, was seeking leave to initiate a suit for specific performance of a sale and purchase agreement ('SPA') entered into between the parties. In that SPA, the respondent had agreed to sell 121 lots of land in its abandoned housing project to the appellant. The appellant paid 10% of the purchase consideration of RM3.5m as deposit together with other expenses. The time for payment of the balance purchase price was extended on condition that the appellant pay a further RM1m. The appellant did not pay the RM100,000. Neither did the appellant pay the balance purchase price by the extended date; and so, the respondent terminated the SPA. The respondent then sold 90 of the 121 lots to a third party. The appellant's main complaint in the intended claim is the respondent's unilateral imposition of RM100,000 for the extension of time. The Court of Appeal noted that by this time, the appellant had already paid almost RM1m.

[36] The Court of Appeal was of the view that this complaint or question 'is a serious dispute between the appellant and the respondent. That question prima facie raises a reasonable cause of action and not to give the appellant the chance to argue that the unilateral imposition of the RM100,000 is unlawful would be contrary to the basic right of the appellant of having his day in court. Not granting leave amounts to shutting the appellant and it is a drastic action which courts should be slow to use'.

[37] We are aware that although *Shencourt Sdn Bhd* and *Mosbert Berhad* were referred to by the Court of Appeal in *Mesuntung Properties*, the Court of Appeal went further to consider and compare the approach to the equivalent s 226(3) under the Australian jurisdiction. After all, the Companies Act 1965 is structured after the Australian corporations law and its then s 371(2) of the Australian Companies Act 1981 was in *pari materia* with our s 226(3). Having taken that route, the Court of Appeal concluded with the two tests that we pointed out above and which the parties before us, just as they did in the court below, have both submitted. The parties have proceeded on the basis that there are now two tests that must be satisfied. The appellants argued that the tests had been met while the respondent argued otherwise; contending that not meeting the first test was enough to knock out the application and hence, this appeal.

[38] We pause to emphasise that the decision in *Mesuntung Properties* does not set down any new test; what the decision has done, in effect, is to put into clearer terms the test laid down in *Mosbert Berhad*. That test now better clarified and which applies regardless whether the application is made under s 226(3) or s 263(2), has been consistently applied in our jurisdiction.

[39] Returning to *Mesuntung Properties,* we agree with the approach enunciated therein. The requirement of leave is necessary to ensure that companies in liquidation and the liquidators of wound up companies are not embroiled in time consuming and expensive litigation which, indirectly will impact on returns to creditors of the wound up company. Since there is already in place a statutory mechanism for resolving disputes and debts by way of lodgment of proofs of debts, there must be some good, cogent or just reason why there should be a departure from that established procedure. The availability of the remedy sought before the winding up court is only one of the reasonable reasons that may be articulated for such departure. We can see complexities of legal and factual issues or even the status of proceedings already underway, being other relevant considerations in the weighing in of exercise of discretion. This is the balancing exercise discussed by Abdul Malik Ishak J in *Bruno Phillipe* that the winding up court will have to weigh when considering whether to exercise judicial discretion to grant or refuse leave to proceed against a company in liquidation. The onus is on the appellants to demonstrate why it is more appropriate in the particular facts and circumstances to proceed by separate civil action instead of by lodgment of a proof of debt.

[40] In the present appeal, the appellants seek the principal remedy of specific performance of the SPA in relation to the two obligations of subdivision and eviction of squatters. Although the learned judge found that the relief sought could not be 'adequately' dealt with by the liquidators, the learned judge was nevertheless persuaded by the presence of the alternative relief of eviction by the appellants themselves in the event the respondent failed to evict the squatters. Where that happens, the appellants seek recovery of the related costs from the respondent. It was, in this sense, that the learned judge concluded that the appellants' claim could be reduced to monetary value and therefore provable in liquidation.

[41] With respect, we cannot agree with the learned judge. Contrary to the view of the learned judge, the remedy of specific performance remains one which the winding up court cannot make; and certainly, it is not a remedy that can be resolved through the lodgment of a proof of debt with the liquidators of the respondent. That order is properly in the jurisdiction of the court in exercise of its civil jurisdiction, and granted, if at all, after trial. The presence of the alternative prayer (b) in the terms set out at p 81 of the record of appeal does not alter that view. There may be a difference, perhaps, if the relief was couched

as an additional relief. The order of specific performance is a discretionary remedy and the law on pleadings allows for this alternative remedy in the event this specific performance is not granted. That however, does not diminish the significance of the remedy as a primary or main remedy. In the weighing of discretion, the court will always question the issue of adequateness of damages as an alternative remedy. It is precisely because damages is not an adequate remedy that specific performance is sought; but in the event the court is not with the appellants, then the appellants want to be allowed this avenue. We do not see how by this alternative plea, leave to commence action against the respondent should be denied.

[42] Moving next to the second test, the learned judge found that the appellants had failed to establish a prima facie case because the appellants have become the registered proprietors of the plots. That, supposedly, leaves the respondent in no position to evict the squatters or even apply for sub division of the bigger plot.

[43] Again, here, we are reminded of what is required in establishing a prima facie case. In *Mesuntung Properties*, it was clearly explained that in the context of s 226(3), what needs to be shown is that there is a serious dispute between the parties that warrants a trial to determine the truth. The court does not delve into the merits of the dispute but examine the complaints, to see if these complaints are genuine or are they baseless and devoid of any substance. If the answer is in the affirmative, resources of the respondent ought not to be wasted defending a baseless or frivolous claim.

[44] The existence of the SPA is not in dispute. In their affidavit in reply to the appellants' application, the respondent has however, denied the existence of the two obligations — see paras 6 and 23 at pp 18 and 23 of the record of appeal [2/1].

[45] We have had a look at the SPA, and contrary to the contentions of the respondent, the SPA dated 21 March 2011 does contain terms concerning the sub division of the bigger plot and the eviction of squatters; for instance recital B and cll 13(a)(iv) and (b):

> Recital B:
>
> The other owners stated in recital A and their respective share in the bigger plot are as follows:
>
> (1) Low Far Ke (NRIC No 600607–10–5941) 2000/47010
>
> (2) Low Huat Cheng ...
>
> (3) Low Huat Lee ...
>
> (4) Low Huat Meng ...

(5) Low Huat Hui ...

(6) Low Wei Hui ...
(hereinafter collectively referred to as 'the other owners')

(7) Maika Holdings Berhad 3190/4701

(hereinafter referred to as the Vendor's plot as demarcated in red in the layout plan annexed hereto as Annexure 1). For avoidance of doubt, the other owners have expressly agreed or otherwise have no objections for the Vendor to sub-divide the bigger plot and that the portion shaded in yellow in Annexure 1 ('other owners' plot') shall be ultimately be issued with an individual title with their names endorsed therein as the registered proprietors.

(the smaller plot and the Vendor's plot are hereafter collectively referred to as 'the Vendor's properties')

Clause 13. Parties' Representations and Warranties

(a) The Vendor hereby covenants, declares, represents, warrants and undertakes with the Purchaser as follows:

(i) the Vendor is the registered owner of the said Property;

(ii) ...

(iii) ...

(iv) within four (4) months from the date of this Agreement, evict or remove all and any squatters or unlawful occupiers of the said property.

(b) The Vendor hereby expressly agree and acknowledge that the Purchaser is entering this Agreement and agreeing to purchase the said Property in reliance upon the covenants, declarations, warranties set forth hereinabove including the recitals to the Agreement.

[46] The appellants have also complained that there are still squatters on the land. This is denied by the respondent — see paras 16 and 19 of the respondent's affidavit in reply at pp 24 and 25 of the record of appeal [2/1]. In addition to the SPA, the appellants have alluded to correspondence exchanged between the parties, post payment and registration, on these matters. In at least one letter dated 5 December 2012 from the respondent's solicitors, the respondent had informed the appellants that 'most of the squatters occupying the land then, and that there is now only two families still occupying a small part of the said land' — see p 150 of the record of appeal [2/1]. Photos of the presence of the squatters or occupiers and the temple have also been exhibited — see pp 212—222 of the record of appeal [2/1].

[47] It is not for this court to evaluate to see the truth of these warring contentions and to determine the real position of the squatters or even the matter of location or relocation of a temple on the subject land; that is for the

civil court to hear and determine. The same goes for the responsibility to apply for subdivision of the bigger plot; whether the respondent, who retains a portion of the bigger plot, though held on trust, can still make such an application. For the purposes of s 263(2), the appellants need to show that their dispute is real, genuine and serious and that they have a prima facie case. We have no doubt that in that regard; the appellants have amply satisfied those considerations. The allegation of breaches of agreement by the respondent are not baseless or without substance. They cannot be said to be frivolous and an attempt to waste the respondent's funds or even to score an advantage over the creditors of the respondent.

[48] Finally, we note that the learned judge had expressed the view that the order of specific performance cannot be granted against the respondent because it will cause financial hardship; or be counter-productive to the object of winding up the respondent, which is to preserve the assets of the respondent for fair distribution. Here, once again, we must remind that it is not for the winding up court to decide whether an order of specific performance ought to be granted on the particular facts; that is the function and role of the civil court in the event leave to commence litigation is allowed. The winding up court should not be second guessing what that court, may or may not eventually decide on the merits. That is entirely within the purview of the civil court.

[49] In this regard, we cannot ignore that the signatories to the SPA who signed on behalf of the respondent are two of the liquidators, although one of them has since passed away. Such persons would be best placed to explain the conflicting versions of obligations.

[50] In this regard too, and, on the concern of hardship, the appellants have shown that there was a retention of some monies amounting to RM993,000, 30% of the purchase consideration by the solicitors of the respondent. This sum is said to have been retained for issues related to private caveat and existing squatters on the subject land. The retention of the sum post SPA is said to confirm the existence of the obligations as alleged by the appellants and address the concerns of the respondent.

CONCLUSION

[51] For all the reasons stated above, we are of the unanimous view that appellate intervention is appropriate in this appeal. The appeal is allowed with costs of RM5,000 here and below subject to the payment of allocator fee. The decision of the High Court is hereby set aside and leave pursuant to s 263(2) of the Companies Act 1965 is granted to the appellants to commence action against the respondent.

A *Appeal allowed with costs of RM5,000 subject to allocator; decision of High Court set aside; leave granted to appellants to commence action against respondent.*

Reported by Fatin Mohd Ismail

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